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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 IN RE: TERRORIST ATTACKS CASE NO.
5 OF SEPTEMBER 11, 2001 03 MD 01570 (GBD)

6 New York, N.Y.
7 April 24, 2014
8 11:42 a.m.

9 Before:

10 HON. GEORGE B. DANIELS,

11 District Judge

12 APPEARANCES

13 COZEN O'CONNOR

14 Attorneys for Plaintiffs Federal Insurance Company and Tig
15 Insurance Co.

16 BY: SEAN P. CARTER, ESQ.

17 J. SCOTT TARBUTTON, ESQ.

18 MOTLEY RICE

19 Attorneys for Plaintiffs

20 BY: ROBERT T. HAEFELE, ESQ.

21 KREINDLER & KREINDLER, LLP

22 Attorneys for Plaintiffs

23 BY: JAMES P. KREINDLER, ESQ.

24 ANDERSON KILL & OLICK, PC

25 Attorneys for O'Neill Plaintiffs and the Plaintiffs'
Executive Committee

BY: JERRY S. GOLDMAN, ESQ.

26 LAW OFFICES OF MELLON, WEBSTER, & SHELLY, PC

27 Attorneys for Plaintiffs
28 BY: THOMAS E. MELLON, III, ESQ.

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1 APPEARANCES (Continued)

2 BERNABEI & WACHTEL, PLLC
3 Attorneys for Defendant, Abdul Rahman Al-Swailem
BY: ALAN R. KABAT, ESQ.4 LAW FIRM OF OMAR T. MOHAMMEDI, LLC
5 Attorney for Defendant, WAMY
6 BY: OMAR T. MOHAMMEDI, ESQ.7 CLIFFORD CHANCE US LLP
8 Attorneys for Dubai Islamic Bank
BY: RONI E. BERGOFFEN, ESQ.9 LEWIS BAACH, PLLC
10 Attorneys for Muslim World League (MWL) and International
11 Islamic Relief Organization (IIRO)
BY: AISHA E. R. HENRY, ESQ.12 SALERNO & ROTHSTEIN
13 Attorneys for Yassin Abdullah Kadi
14 BY: PETER C. SALERNO, ESQ.
AMY ROTHSTEIN, ESQ.15 MARTIN F. McMAHON & ASSOCIATES
16 Attorneys for Defendants, Jelaidin, etc.
17 BY: MARTIN F. McMAHON, ESQ. (PRESENT VIA TELEPHONE)18 MANNING SOSSAMON
19 Attorney for Defendant, Sanabel Al Kheer
BY: CHRISTOPHER MANNING, ESQ. (PRESENT VIA TELEPHONE)20
21 GOETZ & ECKLAND, PA
22 Attorneys for Defendants, World Assembly of Islamic Youth
and World Assembly of Muslim Youth
23 BY: FREDERICK J. GOETZ, ESQ.

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1 (In open court)

2 (Case called)

3 THE COURT: The court reporter has everybody's
4 appearance. Let me do this first. Magistrate Judge Maas is
5 not going to join us, but I spoke to him and he's having a
6 conference after to further coordinate moving forward with the
7 discovery.

8 Let me first ask, and I'll start with the plaintiffs,
9 before I address the motion with regard to the immunity,
10 sovereign immunity motion, let me see where we are and see if
11 there are any other issues that we need to address before then.
12 Let me start with the plaintiff, and just identify yourselves
13 for the court reporter when you speak.

14 MR. CARTER: Good morning, your Honor. Sean Carter
15 from Cozen, O'Connor, on behalf of the plaintiffs. I think,
16 from our perspective, Magistrate Judge Maas has been doing a
17 very effective job at trying to move the discovery process
18 forward. We have presently a date in place for a number of the
19 defendants to complete outstanding productions of documents.
20 At which point, I think we'll evaluate what the schedule
21 dictates going forward.

22 Besides that, as we mentioned in our letter, there are
23 two cert petitions now pending before the Supreme Court.
24 Plaintiffs brought one with regard to the Second Circuit's
25 rulings on personal jurisdiction and the standards of liability

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1 under the Anti-terrorism Act.

2 That petition was then referred by the Court to the
3 Solicitor General for the views of the United States. We would
4 normally expect the Solicitor General to file its amicus brief
5 somewhere in the mid-May period. At which point, then, the
6 matter would essentially be ripe for the Court to resolve
7 whether to grant cert or not, and we would expect a decision on
8 that petition in June.

9 Briefing on the Kingdom's -- Kingdom of Saudi Arabia's
10 separate cert petition is going to conclude near the end of May
11 as well, and we would expect that to be considered at a
12 conference of the Supreme Court in June also.

13 And for those reasons, we had suggested that it might
14 make sense to at least put a conference on the calendar for
15 July, in case those results dictate that there's a need for a
16 dialogue between the parties and the Court, just with the
17 understanding that if whatever happens doesn't necessitate a
18 hearing, we can always cancel it, but the number of parties
19 sort of dictates that we try to be thoughtful in advance.

20 THE COURT: Why don't I go ahead and tentatively
21 schedule a July 15th conference. Tuesday, July 15th at 11:00.

22 What's the status of the jurisdictional discovery, as
23 a result of the previous Second Circuit briefing?

24 MR. CARTER: Your Honor, there were a dozen or so
25 defendants remanded for jurisdictional discovery by the

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1 decisions issued in April. We promptly propounded discovery on
2 them. The deadline for completion of their document
3 productions is aligned in with deadline for the merits
4 discovery for defendants to complete their document production.
5 My recollection is that those productions presently are due by
6 the end of June.

7 THE COURT: Okay. And then so what's the timetable on
8 that, in terms of further review of jurisdiction.

9 MR. CARTER: What we've discussed generally with Judge
10 Maas at this point is that there would probably need to be a
11 window following the completion of document productions for the
12 parties to evaluate the materials produced.

13 There's a need to do a fair number of translations in
14 this setting, and so once we have the complete package of
15 documents, we intended to confer with Judge Maas to set a
16 window for purposes of evaluating it, file any necessary
17 motions to compel dictated by the nature of the productions,
18 and then move forward with everything else and try to set a
19 concluding deadline for all discovery proceedings.

20 THE COURT: So at this point, you do not have a date
21 for filing of briefs?

22 MR. CARTER: We do not, your Honor.

23 THE COURT: And the date for completion of discovery,
24 for the jurisdictional discovery is when?

25 MR. CARTER: We don't have a date for completion of

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1 all judicial discovery. We have a date for completion of
2 document production by all parties, which is the end of June.
3 And we have discussed with Judge Maas that we would meet with
4 him shortly before that to try and set some further dates based
5 on how things had proceeded over the periods of months
6 preceding that deadline.

7 THE COURT: What would you anticipate that this point?

8 MR. CARTER: It's difficult for us to predict, your
9 Honor, because some of the defendants suggested that near the
10 deadline, we may be receiving as many as hundreds of thousands
11 of documents. So we really, sort of, need to see what that
12 embodies, at which point we'll be in a better position. We're
13 hopeful that we'll be in a position to spend a relatively brief
14 window of time doing the necessary motions to compel at the end
15 of the document production and, in certain cases, maybe be
16 moving forward with depositions on a parallel track.

17 THE COURT: All right. So then, are there any other
18 outstanding issues that, from the plaintiffs' perspective, that
19 need to be addressed here as opposed to before Judge Maas?

20 MR. CARTER: No, your Honor. I think we intended to
21 address most of these scheduling issued with Judge Maas in his
22 role of managing discovery in the near future.

23 THE COURT: Let me turn to the defense. Are there any
24 issues that need to be addressed, other than the motions? No?
25 All right.

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1 So I've been, obviously, in close contact with
2 Magistrate Judge Maas and, as you say, he's moving forward
3 efficiently with the discovery. So what I think we'll -- as I
4 say, I've already scheduled the July 15th date for 11:00, and
5 then you can give me letters before that date as to whether or
6 not we should have that conference, and if we are to have that
7 conference, what issues that should be addressed at that
8 conference.

9 So I guess, then, we can go straight into the motion.
10 Who is going to argue the motion? Mr. Kabat? Yes, sir.

11 MR. KABAT: Good morning, your Honor. Allen Kabat on
12 behalf of Dr. Al-Swailem. There are two reasons why this Court
13 should dismiss Dr. Al-Swailem, who is the former head of both
14 the Saudi Red Crescent and the Saudi Joint Relief Committee.

15 First, he's entitled to common law sovereign immunity,
16 as all of the plaintiffs' allegations against him relate solely
17 to his role as an official of the Saudi government. Plaintiffs
18 have consistently pled that both the Saudi Red Crescent and the
19 Saudi Joint Relief Committee are agencies or instrumentalities
20 of the government; the allegations are solely as to his
21 official acts. The Saudi government, through its Ambassador,
22 have properly invoked immunity on his behalf. The scope of
23 common-law sovereign immunity is actually broader than that
24 immunity under the Foreign Sovereign Immunity Act, because the
25 statutory exceptions under the FSIA do not apply to common-law

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1 sovereign immunity. That's why this Court lacks subject matter
2 jurisdiction under rule 12(b)(1).

3 Secondly, the plaintiffs cannot sue Dr. Al-Swailem
4 because the real parties in interest are the Saudi Red Crescent
5 and the Saudi Joint Relief Committee, and one cannot circumvent
6 their undisputed immunity under the Foreign Sovereign Immunity
7 Act by suing Dr. Al-Swailem for his official acts.

8 Let me turn to the lack of subject matter
9 jurisdiction. As a threshold matter, plaintiffs have never,
10 never disputed that the Saudi Red Crescent and the Saudi Joint
11 Relief Committee are agencies and instrumentalities of the
12 Saudi government, and they are covered by the FSIA. Although
13 the plaintiffs did argue that the tort exception to the FSIA
14 applied to those two entities, the Second Circuit held that
15 they were covered by the FSIA and the tort exception did not
16 apply.

17 Although plaintiffs did file cert petitions with the
18 Supreme Court as to the Second Circuit's other two decisions,
19 they did not do a cert petition as to the Saudi Red Crescent
20 and the Saudi Joint Relief Committee; so that decision is
21 final.

22 Plaintiffs' opposition, which now argues that the
23 Saudi Red Crescent and the Joint Relief Committee are, quote,
24 private charities, or quote, non-governmental organizations, is
25 contrary to the Second Circuit's decision which is the law of

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1 the case. In fact, plaintiffs did not even argue that
2 commercial-activities exception to the FSIA; so plaintiffs
3 cannot now argue that these agencies are private charities.

4 Let me say a few words about why common-law sovereign
5 immunity is actually broader than the immunity under FSIA. The
6 Supreme Court, in the 2010 decision in *Samantar*, held that FSIA
7 does not cover individual officials through the change in the
8 law.

9 Now, critically, the scope of common-law immunity is
10 broader than the immunity of the agencies like the Saudi Red
11 Crescent, because the commercial exception or the tort
12 exception in the FSAI do not apply at all to common-law
13 sovereign immunity. The Supreme Court, in its *Samantar*
14 decision, cited a decision from the Southern District case
15 called *Greenspan v. Crosbie*, for the proposition that even if a
16 foreign state could be liable on a contract claim, the
17 individual foreign official would not be liable under
18 common-law sovereign immunity because you don't have the
19 statutory exception.

20 And, indeed, the U.S. government, when it submitted
21 its brief to the Supreme Court in the first appeal of this
22 case, that's the *Federal Insurance v. Saudi Arabia* appeal back
23 in 2009, similarly wrote that the executive branch continued to
24 recognize the immunity of foreign officials for their official
25 acts in circumstances even in which the foreign state would be

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1 liable. And, again, the U.S. government in that Supreme Court
2 brief cited the *Greenspan* case.

3 And there are two ways that this Court can determine
4 common-law sovereign immunity. The Court could either rely
5 upon a submission from the Department of State, or if the
6 Department of State shall not decide to submit one, then the
7 Court can simply determine, quote, whether the ground of
8 immunity is one which it is the established policy of the
9 government to recognize.

10 And the Second Circuit, in the *Heaney v. Spain* case,
11 explained that when the State Department didn't submit an
12 affidavit, then you can rely on an affidavit from the
13 Ambassador of the defendant's home country. That's what we
14 have done as Exhibit 4 to our motion to dismiss, that the
15 Ambassador of the Saudi government to the U.S. government, who
16 explains that Dr. Al-Swailem was a government official, who
17 acts as the head of Saudi Red Crescent and Saudi Joint Relief
18 Committee, for official acts on behalf of the government.

19 THE COURT: Let me interrupt you there because this is
20 the real critical issue, first, defining what the acts are that
21 are at issue. It does not appear to me to be an appropriate
22 analysis in the abstract simply based on his position or role
23 or his general governmental function.

24 Isn't the real issue whether or not the acts that they
25 accuse him of, themselves, that those acts provide some

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1 immunity because those are the acts of the government? What
2 conduct do you say he has immunity for? Because I look at it
3 as a question of what conduct that you say he should have
4 immunity for rather than his status as a government official.

5 He's not being -- currently their position is that
6 he's not being sued in his official capacity. He is being sued
7 personally and individually for conduct that is not official
8 conduct that would fall under any governmental function. So
9 what is the conduct that you -- how do you define the conduct
10 that you say is protected by sovereign immunity?

11 MR. KABAT: That's true, your Honor, but here the
12 plaintiffs specifically pled in their complaint in the initial
13 statements and all the acts of Dr. Al-Swailem were in his
14 official capacity. Now, in their opposition motion to dismiss,
15 plaintiffs attempted to contradict their own pleadings by
16 saying for the first time that these acts were not in his
17 official capacity, but were in his personal capacity.

18 But for purposes of the motions that we have to look
19 at the allegations in the complaint and the RICO statement,
20 which made clear that the plaintiffs theory indicates that if
21 everything else Swailem did was in his official capacity, and
22 they presented no evidence in their RICO statement of their
23 complaint to overcome that. And secondly --

24 THE COURT: Well, do you recognize that distinction?
25 Would you have any argument?

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1 MR. KABAT: Pardon?

2 THE COURT: Would you have any argument if they had
3 not -- if they're alleging that he's being sued in his personal
4 capacity?

5 MR. KABAT: Well, the only act the plaintiffs alleged
6 related to Dr. Al-Swailem is that he made the decision to hire
7 someone, a fellow named Wael Jelaidin, as the director of the
8 Saudi Joint Relief Committee. However, plaintiffs' RICO
9 statement as to Wael Jelaidin makes no mention of either the
10 Saudi Red Crescent or the Saudi Relief Committee.

11 Even that one allegation that he hired Mr. Jelaidin
12 does not help plaintiff on long-settled law. The Second
13 Circuit, in the *Heaney* decision, held that government officials
14 are covered by sovereign immunity. In other words, they're
15 immune to individual liability for their hiring or employment
16 decisions, but the plaintiff cannot really circumvent sovereign
17 immunity of a state by suing individual officers for a hiring
18 decision that they made, which is what the U.S. government
19 recognized its brief to the Second Circuit in the *Matar* appeal.

20 THE COURT: So are you limiting the conduct that they
21 are basing their lawsuit against him individually on -- your
22 limiting it to the hiring? I mean, I understand your argument
23 that hiring someone on behalf of the government entity can be,
24 and probably is, an official act. But it seems to me -- and
25 I'll have them articulate it. It seems to me that the

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1 determinative issue is what you hire him to do, what you allow
2 him to do, and what you participate and knowingly participate
3 in the acts which they say caused them injury.

4 MR. KABAT: Well, your Honor, while the plaintiff may
5 have a claim against the individual who did cause them injury,
6 they do not have a claim against any sovereign official who
7 simply made a hiring or other employment decision.

8 THE COURT: Well, but that's true of any -- I mean,
9 that's, as they say, that's a truism in the abstract. It's
10 clear to me that they're going to have to give me a little bit
11 more than simply saying that it has been determined that the
12 entities are government entities entitled to sovereign
13 immunity. He, in his capacity as an official of the government
14 entity, decided who to hire; so, therefore, we want to sue him,
15 and he doesn't have sovereign immunity for who he hires.

16 Well, they've got to tell me a little bit more than
17 that. The case is not about just that. If it was about just
18 that, it's clear that a hiring decision, in and of itself, by
19 itself, is not an act which would be in any way characterized
20 as an act, other than an official act, on behalf of the
21 sovereign if he is employed by the sovereign and the power to
22 appoint employees is given to him by the sovereign.

23 The difficulty that I'm having is that it seems to me
24 that your argument is too narrow and their argument is too
25 expansive. It's not just limited to who he hired, and that

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1 doesn't cover everything he did as a government official. So
2 there's got to be something in between. As I say, I'm trying
3 to -- the way the case is being articulated now, and I think
4 appropriately because given the developments in the law just in
5 these cases, is that in order to sue him, they have to sue him
6 in his individual capacity, not in his official capacity. And
7 they have to sue him for acts which are not considered to be
8 acts of the sovereign. Would you agree with that?

9 Now, they may or may not agree with that. I'll see if
10 they agree with it, but that's where I'm starting. Okay? So
11 that somebody has to clearly define for me on this record what
12 other activities that we say it's limited to, it excludes, it
13 includes.

14 MR. KABAT: That's a correct way of looking at the
15 law, but the problem here is that the plaintiffs did not sue
16 him in his individual capacity for things that he took outside
17 the scope of his official duties. Instead, if you look back at
18 the complaint and official statement, they made clear that they
19 were suing him in his official capacity as the head of the
20 Saudi Red Crescent and the Saudi Joint Relief Committee, and so
21 that's why the common-law sovereign immunity applies in this
22 context. Plaintiffs did not allege that he took acts that were
23 contrary but outside the scope of his duties, and in fact, the
24 affidavit from the Saudi ambassador makes that clear, too, that
25 what Dr. Al-Swailem did was in his official capacity.

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1 Now, plaintiffs, in their opposition, claimed the
2 guidance from the State Department is required. However, the
3 Supreme Court in the Second Circuit has held that sovereign
4 immunity can be decided without the U.S. government's views.
5 That goes way back to 1945, the *Mexico v. Hoffman* case; 1983,
6 the *Verlinden v. Nigeria* case; 1969, the *Heaney v. Spain* case.

7 And, in fact, counsel for the Ashton plaintiffs in
8 this court represented plaintiffs in other terrorist financing
9 litigation in the Eastern District of New York, *Rosenberg v.*
10 *Lashkar*. And in that case, the Ashton plaintiffs' law firm
11 demanded that the Eastern District judge, Judge Irizarry, get
12 the views of the Department of State. Well, she made that
13 request. It took the State one year to respond, and then State
14 explained in their brief that the individual defendants were
15 entitled to common-law immunity. That's Exhibit 1 in our reply
16 brief. But the Kreindler firm repudiated the State submission.

17 THE COURT: Well, they didn't get the answer that they
18 wanted. I understand that, but -- and I understand what
19 happened -- I mean, I understand the record in that case, but
20 doesn't that -- I mean, look, I'll tell you exactly what my
21 rationale is. You've made a tactical decision. That's what
22 you decided. You decided you didn't want to ask the State
23 Department what they thought.

24 So whether they repudiated it in Judge Irizarry's case
25 in the decision by the State Department, you're not even taking

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1 a chance that you're going to get an adverse decision by the
2 State Department. You want to avoid them altogether. So you
3 don't have the benefit of saying to me that you went to the
4 State Department, they say that your guy is entitled to
5 immunity; so therefore, that should decide the issue.

6 You don't want to know what they think. You want to
7 know what I think they think. I understand that, but that puts
8 you in the situation that what I must determine, and I'll take
9 it right out of Hobby. What I must determine is whether or not
10 the ground of immunity that you are urging is one which is the
11 established policy of the Department to recognize. Isn't that
12 the standard that I'm supposed to use?

13 MR. KABAT: That's correct.

14 THE COURT: Okay. So where do I look? Give me a
15 similar circumstance that demonstrates the established policy
16 is to grant immunity in this type of situation.

17 MR. KABAT: Well, probably the best example is the
18 case I just mentioned out of the Eastern District of New York,
19 where the State Department submitted its view in the terrorist
20 financing case, where it involved much closer allegations
21 between the individual defendants and the alleged terrorism.
22 And in that case, the State Department explained -- it's
23 Exhibit 1 in our reply brief -- that the individual defendants
24 were entitled to common-law immunity. Let me check that in the
25 brief. Starting on Page 7 of Exhibit 1 to our reply brief,

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1 where it says: The State Department discussed it at great
2 length here. The position of common-law sovereign immunity of
3 the two individual defendants, and recognizing that in some
4 cases -- this is on Page 9 -- in some cases, the Department of
5 State may conclude that the conduct was not in the official
6 capacity such as purely private acts. However, the State
7 Department goes on to explain that while they're expressing no
8 views as to the merits of these plaintiffs' claims, the
9 plaintiff allegations were based on the official acts of those
10 two individual defendants. So that's based on this submission
11 is one example of what the Court can look to.

12 In our motion to dismiss, we also cite the State
13 Department's submission to the Second Circuit in several other
14 cases, including the *Matar v. Dichter* from 2009, the *Kensington*
15 v. *Itoua*, which I think was in 2007. Those are in our motion
16 to dismiss, but those are the source of where the State
17 Department has said, repeatedly explained, that the common-law
18 sovereign immunity, not only broader immunity under FSIA, but
19 it also covers the official acts of the individual sovereign
20 official.

21 THE COURT: I understand your argument that it is
22 broader, but I'm not sure what you mean by that. In what way
23 do you want me to make it easier for you? Broader, you give me
24 almost synonymous with easier. In what way are you saying that
25 a broader interpretation of sovereign immunity is relevant

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1 here?

2 MR. KABAT: The reason that's important is because if
3 the plaintiffs had alleged that Dr. Al-Swailem engaged in
4 tortious conduct, then if we were under the FSIA, that we might
5 be talking about the tort activity exception. And, of course,
6 here, both this Court and the Second Circuit, found that that
7 tort exception didn't even apply.

8 THE COURT: Right. So I don't know why there would be
9 any comparison at all. I mean, it's not -- there's not a more
10 limited analysis. That analysis doesn't apply to individuals.
11 That's what the Court said. It didn't say that there's a
12 broader analysis that applies. It says that Congress did not
13 intend for that statutory scheme to cover individuals. That's
14 what they determined.

15 So I see it being inapplicable, but I don't see why --
16 in what sense you're saying that that is a relevant broader
17 interpretation that somehow makes it easier for me to rule in
18 your favor.

19 MR. KABAT: Because there are no exceptions to
20 common-law sovereign immunity for official acts. None.

21 THE COURT: All right. Okay. I understand that. I
22 mean, there's never been, and I don't think anybody's arguing
23 that there's such an exception. The question is whether or not
24 the acts that are at issue are acts of the sovereign. Isn't
25 that really still where we come back to? I mean, I see that as

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1 a different analysis. I don't see that as a broader analysis.

2 I'm not sure in what way that's a broader analysis.

3 I mean, I have to remind myself of Judge Irizarry's
4 case. Again, what I was focused on, what was the activity that
5 the Pakistani officials were involved in that the State
6 Department said that that was official state action entitled to
7 immunity. That's the real comparison that I'm looking for. I
8 don't get, just because they said in that case, it's, quote, a
9 terrorist case, and we say that these officials have immunity.
10 That's not really the policy that I'm looking for.

11 I'm looking for, well, why did they say? What is the
12 nature of the conduct that they say puts that in the area of
13 sovereign immunity, and is that what we are comparably dealing
14 with here in terms of the activity? What is -- How is what the
15 Pakistani -- remind me of what the Pakistani officials were,
16 what conduct was at issue. Because my recollection was that I
17 tried to compare what the State Department said about their
18 activities and compare it to what the plaintiffs are arguing
19 about the activity here. I don't necessarily think that
20 they're equal or the same, that it's the same acts.

21 MR. KABAT: We think the conduct that was alleged in
22 that Pakistani case was far more egregious as to those two
23 individual defendants in the Pakistani case than what
24 plaintiffs allege here, which is that Dr. Al-Swailem made a
25 hiring decision and hired someone to be the director for the

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1 Saudi Joint Relief Committee.

2 Plaintiffs allegations in that Eastern District case
3 go far beyond, far more detail than what we have here with
4 Dr. Al-Swailem. So the fact that the Department of State would
5 recognize common-law sovereign immunity as to those two
6 Pakistani defendants, who did far great worse things in much
7 greater detail than we have here. If this Court were to wait
8 one year for the State to come into this case, the result would
9 be the same.

10 THE COURT: All right.

11 MR. KABAT: And let me just wrap up in a minute or
12 two. I want to alert this Court to a recent decision by Judge
13 Schofield in a case called *Smith Rocke v. Venezuela* in the
14 Southern District of New York, January 27, 2014.

15 THE COURT: I'm sorry, I didn't hear you. Who's
16 decision did you say it was?

17 MR. KABAT: Pardon?

18 THE COURT: Whose decision did you say?

19 MR. KABAT: Schofield.

20 THE COURT: Oh, Judge Schofield.

21 MR. KABAT: She recently held the individual
22 defendants, who are officials of the country of Venezuela, had
23 to be dismissed from that case, since the real party in
24 interest was the country of Venezuela, which was immune under
25 the FSIA. She explained that under *Samantar*, plaintiff could

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1 not avoid or circumvent the Foreign Sovereign Immunity Act
2 through, quote, artful pleadings by trying to name the state
3 official, in his official capacity, when the action was clearly
4 against the foreign government -- the foreign agency, as the
5 real party in interest.

6 THE COURT: Well, that argument seems to me to be
7 somewhat certain because it seems to me that -- I don't know
8 how to analyze whether or not the sovereign is the real party
9 in interest without first concluding that the individual was
10 acting in his official capacity involved in purely official
11 acts. So, I mean, it's sort of a circular argument. I don't
12 know how one can go without the other.

13 I don't know a scenario that you could give me that
14 they could not be the real party in interest if I accept the
15 argument that he was taking an official act in his official
16 capacity. Well, if he was taking an official act in his
17 official capacity, I don't need to worry about who's the real
18 party in interest. He's got an interest. If he's not, then
19 he's sued for official acts in his official capacity, and if
20 they're seeking individual damages against him for his
21 individual conduct, then they're not the real party in
22 interest.

23 So I'm not quite sure how that's a separate analysis
24 that takes us anywhere. Because we have to resolve those
25 issues before we even get there, and resolving those issues,

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1 that defines whether or not he gets sovereign immunity
2 independently, seems to me.

3 MR. KABAT: Let me respond. First of all, plaintiffs
4 did not sue Dr. Al-Swailem in his individual capacity; so
5 they're not going to get any damages from him personally.
6 Instead, by suing him in his official capacity, the only way
7 they can get damages is from the agencies, the Saudi Red
8 Crescent and Saudi Joint Relief Committee, both of which this
9 Court and the Second Circuit have held they're immune.

10 Now, the Supreme Court in the *Samantar* case, as well
11 as the earlier case, called *Philippines v. Pimentel*, back in
12 2008, held that a case could not go forward against an
13 individual if the foreign state or its agency -- here the Saudi
14 Red Crescent and the Saudi Joint Relief Committee -- were
15 required parties.

16 Yet, plaintiffs have conceded that they cannot go
17 forward against the Red Crescent and the Saudi Joint Relief
18 Committee. We know that because they didn't file a circuit
19 petition as to those two agencies. That alone requires
20 dismissal on the claims against Dr. Al-Swailem.

21 And, finally, both the Supreme Court and the Second
22 Circuit have made clear that sovereign immunity, whether we're
23 talking about common-law sovereign immunity or immunity under
24 the FSIA, is immunity from suit, not just immunity from
25 liability. Subjecting Dr. Al-Swailem to extensive discovery

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1 into the operations of the Saudi Red Crescent and the Saudi
2 Joint Relief Committee violates that well-settled principle.

3 Exhibit 5 to our motion to dismiss is the plaintiffs'
4 document request to Dr. Al-Swailem. They submitted 113
5 document requests. Just over a hundred of them were about the
6 operations of the Saudi Red Crescent and the Saudi Joint Relief
7 Committee, particularly, communications that those agencies had
8 with other Saudi government agencies. Fewer than ten of those
9 document requests are actually deemed what might be
10 Dr. Al-Swailem's personal documents. That is contrary to what
11 the Second Circuit in *Robinson v. Malaysia* case that held you
12 do not subject individual sovereign defendants to that kind of
13 discovery.

14 And, finally, plaintiffs' argument --

15 THE COURT: Why are they being subject to that kind of
16 discovery? Either he has those documents personally or he does
17 not. They can't force him to produce the documents, nor can
18 they force the sovereign to produce the document as a party in
19 this case because they're not a party in this case. I'm not
20 even sure I would venture to guess that they may not have any
21 other avenue to force the sovereign to give them the documents.

22 So what is the burden you say is being placed on the
23 sovereign by asking him personally for documents that he would
24 personally, in a lawsuit, have an obligation to turn over if
25 they are accessible to him?

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1 MR. KABAT: Well, first of all, we're faced with a
2 potential motion to compel if plaintiff decides to go after
3 Dr. Al-Swailem for the fact that he did not produce documents
4 that belonged --

5 THE COURT: That would be a legitimate motion if he
6 was perfectly capable of producing those documents, and he was
7 not taking steps to produce those documents.

8 MR. KABAT: And, secondly, Dr. Al-Swailem is now
9 retired from both the Saudi Red Crescent and the Saudi Joint
10 Relief Committee I think about five or six years ago. He's
11 not -- he may be retired from the Parliament too. So it's not
12 as if he can go back to his former agency and say you need to
13 give me all these documents.

14 THE COURT: But those are issues that could come up in
15 any litigation. If you're suing a person who ran over you with
16 their car and you want documents from their employer when they
17 were driving the truck for the employer, if they don't work
18 there anymore, you're faced with the same situation that you're
19 faced with every day about whether or not that person has those
20 documents available to them, whether they're refusing to
21 produce those documents or whether they have an inability to
22 produce, personally to produce those documents. How is that
23 unique to this -- to a Sovereign Immunity Act?

24 MR. KABAT: Well, if plaintiff had withdrawn all those
25 document requests, I wouldn't be making this argument, but

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1 those documents requests are still out there.

2 THE COURT: Well, I'm not sure what is the
3 inappropriateness of making that request to the party
4 defendant. The response is always, as I always say in every
5 case, I have it, I will give it to you; I have it, I won't give
6 it to you; I don't have it. Those are the three responses.
7 How does that affect the sovereign?

8 MR. KABAT: Well, the entire problem with the
9 plaintiffs' argument throughout this case is that they sued
10 Dr. Al-Swailem in his official capacity as the head of these
11 two agencies, and yet, both in their discovery requests and
12 their opposition to motions to dismiss, they've completely
13 backtracked on that by claiming, well, we're suing him for
14 personal acts. Whatever he did wasn't in his official
15 capacity.

16 So the discovery requests are just another example of
17 how the plaintiffs, in their motions and their opposition and
18 their discovery requests, are completely contradicting what
19 they are claiming of Dr. Al-Swailem.

20 And my very last point is that plaintiffs, in their
21 opposition, argue that this Court should resolve personal
22 jurisdiction before subject matter immunity. Well, that's
23 directly contrary to Second Circuit precedent, which makes
24 clear that sovereign immunity is immunity from suit, not just
25 liability. Second Circuit says that in the *Rein v. Libya*,

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1 1998; and *Robinson v. Malaysia* 2001. And, likewise, the
2 Supreme Court has made it clear there are no mandatory
3 sequencing of jurisdictional defenses in the *Sinochem v.*
4 *Malaysia* in 2007.

5 So in conclusion, your Honor --

6 THE COURT: Well, let me just quickly ask you about
7 that. Even you, in your submission, rely upon -- or at least
8 attach as an exhibit, and I believe it is the -- it may be in
9 the statement of interest a suggestion of immunity that you
10 relied upon out of Judge Irizarry's case.

11 Even the State Department, in citing *Sinochem*, said in
12 their footnote 3: In a case involving a claim of immunity, the
13 Court need not address the immunity question until they have
14 first reached determinations on threshold issues, including
15 whether a foreign official defendant has been properly served
16 and whether the Court has personal jurisdiction.

17 MR. KABAT: Well --

18 THE COURT: And I'm not sure that I know of a case
19 that said, on threshold issues, that somehow immunity is the
20 issue that should be determined prior to whether or not you
21 have jurisdiction, personal jurisdiction or subject matter
22 jurisdiction.

23 And I should say that your argument isn't particularly
24 compelling on this issue since that's not the motion that you
25 first made. That's a motion you made years later, after the

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1 case has been remanded back for jurisdictional discovery on
2 your jurisdictional motion.

3 It's not a particularly compelling argument that
4 there's some urgency with regard to assigning sovereign
5 immunity prior to jurisdiction when you never raised sovereign
6 immunity for years. And you raised jurisdiction, and the
7 Court, even the Circuit addressed personal jurisdiction before
8 you raised sovereign immunity.

9 What's the compelling -- How did sovereign immunity
10 get now ahead of that?

11 MR. KABAT: Your Honor, what happened in this case is
12 that we did, in fact, bring both sovereign immunity, 12(b)(2),
13 personal jurisdiction and 12(b)(6). And your Honor, back in
14 2010, declined to address the sovereign immunity, and you
15 dismissed Dr. Al-Swailem for lack of personal jurisdiction.
16 Part of the reason was that the Supreme Court had just come out
17 with its *Samantar* decision, which somewhat complicated the
18 decision because the parties had proceeded. *Samantar* said, no,
19 you have to go under common law sovereign immunity.

20 Well, in 2010, your Honor appropriately decided not to
21 weigh into that at that time, when Dr. Al-Swailem had been
22 fully briefed personal jurisdiction defense, and that went up
23 on appeal. The Second Circuit refused to look at the personal
24 jurisdiction defense of Dr. Al-Swailem and the others. We did
25 brief the sovereign immunity and common law, but the Second

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1 Circuit decided not to go there.

2 THE COURT: All right. Thank you. I hadn't
3 remembered. Well, let me hear from the other side.

4 MR. KABAT: Thank you.

5 MR. CARTER: Thank you, your Honor. Dr. Al-Swailem's
6 motion to dismiss pursuant to doctrines of common-law immunity
7 fails for at least three reasons. The first is the procedural
8 defect that your Honor was just discussing with Mr. Kabat. The
9 State Department has made very clear its policy that sovereign
10 immunity determinations under the common law should be
11 undertaken only after threshold questions such as service of
12 process and personal jurisdiction have been resolved. That's
13 not the case here.

14 There are also two substantive --

15 THE COURT: Well, I mean, that's not the law.

16 MR. CARTER: Your Honor, it's the stated policy of the
17 State Department and it reflects --

18 THE COURT: I know, but that's a stated policy on a
19 legal procedural issue, a court issue. I'm not sure --

20 MR. CARTER: Your Honor, I think it's a protocol that
21 reflects the study judgment of the State Department that
22 individual immunity determinations necessarily have
23 far-reaching implications to U.S. national foreign policy
24 interests and involve a range of complex questions. And it
25 would be the preference of the United States to avoid those

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1 determinations unless they are absolutely necessary.

2 And so, in this context, the answer that Mr. Kabat
3 offered that sovereign immunity is immunity from suit, not just
4 from liability, is really no answer at all because, at base, a
5 request for a grant of individual official immunity is, in
6 effect, a request for the favor of the United States' grace and
7 comity. And in that setting, it follows necessarily that the
8 U.S. government's national interests, in avoiding unnecessary
9 sovereign immunity determinations, trump the individual
10 official's interest in avoiding modest discovery burdens
11 associated with resolving threshold issues such as service of
12 process and personal jurisdiction. And as your Honor
13 indicated --

14 THE COURT: Well, I can't use the word modest in this
15 instance.

16 MR. CARTER: Well, your Honor, again --

17 THE COURT: It just doesn't apply.

18 MR. CARTER: Well, your Honor, in practical reality,
19 it is relatively modest because Mr. Kabat --

20 THE COURT: Not relatively with regard to sovereign
21 immunity. The issue of sovereign immunity is before me.
22 You're arguing the issue of personal jurisdiction. You haven't
23 even completed discovery and haven't even begun to brief.

24 MR. KABAT: Your Honor, but with regard to Mr. Kabat's
25 client, Dr. Al-Swailem, he identified a number of document

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1 requests, and your Honor has very acutely pointed out that to
2 the extent the documents aren't in his possession, custody or
3 control, he doesn't have to produce anything.

4 And as a reality, he has completed what we understand
5 to be his full production. It consisted of an online biography
6 of Dr. Al-Swailem and a series of affidavits that had already
7 been filed in this litigation in support of his motion to
8 dismiss and the motions to dismiss of the Saudi Joint Relief
9 Committee and Saudi Red Crescent.

10 So in other words, he told us, I don't have any
11 documents. I've produced these five or six things, and that's
12 the total universe of documents I'm burdened to produce in this
13 litigation, and that's already occurred.

14 So in this setting, it is relatively modest and,
15 again, as your Honor pointed out, the reason that the personal
16 jurisdiction question has been tee'd up this way is because of
17 very conscious choices that Dr. Al-Swailem made along the way,
18 and I think the record needs to be clarified on this point
19 because Dr. Al-Swailem made the strategic decision initially to
20 proceed only under the FSIA.

21 When the Solicitor General filed its brief in the
22 prior Supreme Court proceedings in this litigation, we urged
23 that defendants claiming individual immunity should proceed to
24 brief it under the common law and invoke the views of the State
25 Department. They declined at that time. When the Supreme

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1 Court decided *Samantar*, we suggested that briefing should
2 proceed on a full record relative to the common-law immunity
3 question. They declined to do that.

4 Those choices had the necessary effect of prioritizing
5 the personal jurisdiction question. It was really the only
6 issue that was fully before your Honor to decide at that point,
7 because they declined to brief it at various invitations from
8 the plaintiffs. And as a consequence of that, it went up to
9 the Second Circuit. The only issue before the Second Circuit
10 with regard to Dr. Al-Swailem was personal jurisdiction.

11 He noted in a two-line paragraph that he and other
12 Saudi defendants intended to raise common-law immunity defense
13 in the event of remand, but it wasn't briefed in any
14 substantive respect in the proceedings before the Second
15 Circuit, and that's a very fundamental procedure defect with
16 this.

17 But there are, in addition, your Honor, two critical
18 substantive defects. They both are impacted by the strategic
19 decisions that Dr. Al-Swailem made to not seek the views of the
20 State Department in this litigation. As the Second Circuit
21 made clear in its decision in *Victory Transport* and then
22 reiterated in its decision in *Heaney*, the extension of
23 common-law immunity is a derivation of the Court's
24 jurisdiction, and for that reason, the Second Circuit explained
25 in *Victory Transport*, that it should be accorded only in cases

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1 where it is absolutely clear, unless the State Department has
2 provided its express views supporting immunity.

3 So in other words, in the absence of a formal
4 submission from the State Department supporting immunity, the
5 Court considering the issue, in isolation, should limit common
6 immunity defenses to five categories of conduct, which involve
7 historically public acts for which nations were especially
8 sensitive.

9 THE COURT: Well, they argue that that was an
10 illustrative but not exclusive list. What are you relying on
11 that says that those are the only circumstances in which
12 sovereign community applies?

13 MR. CARTER: Your Honor, the specific language of the
14 decision is that the sovereign immunity will not be extended
15 unless it is plain that the activity in question falls within
16 one of the categories of strictly political or public acts
17 about which sovereigns have traditionally been quite sensitive.

18 THE COURT: Okay.

19 MR. CARTER: And then the Court went on to explain
20 that those categories are limited to internal administrative
21 acts --

22 THE COURT: I'm sorry. I want you to quote that part
23 of it, that the Court went on to explain that those categories
24 or venue. Are you quoting that?

25 MR. CARTER: I am, your Honor, from *Victory Transport*,

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1 and it's quoted again in *Heaney*, which is one of the cases the
2 defendants rely upon.

3 THE COURT: Okay. All right. Go ahead, I'm sorry.

4 MR. CARTER: Now, your Honor, the Second Circuit did
5 allow in *Victory Transport* that an extension of those
6 categories may be appropriate upon recommendation of the State
7 Department in a particular case, but the effect of the decision
8 by Dr. Al-Swailem to refrain from requesting the support of the
9 State Department has the impact of caveating him into the
10 structure announced in *Victory Transport*. And his activities
11 here, whether official or private or not, don't fall anywhere
12 near within the scope of the five categories, which is --

13 THE COURT: Well, I'm sorry. I didn't mean to
14 interrupt you, but let me just focus myself. In what capacity
15 does your complaint sue him?

16 MR. CARTER: Well, he's sued individually, seeking
17 money damages in his own name, your Honor. That's quite clear
18 from the complaint. Now, with regard to this area of the law,
19 there is a distinction drawn, a legal distinction between what
20 are called official acts and what are called private acts.

21 The term "private" in this legal setting does not
22 connote acts undertaken for personal advantage or gain.
23 Rather, the traditional rule is that acts that are illegal or
24 exceed an official's authority, even if undertaken in
25 connection with the governmental role, are characterized as

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1 private and not acts of the State.

2 THE COURT: Well, I think there's an exception to
3 that, and I think you probably accepted that exception until
4 they got sovereign immunity. That doesn't apply with the
5 sovereign -- if those acts are being done at the sovereign's
6 behest.

7 MR. CARTER: Your Honor, the limitation on illegality
8 or legality doesn't fall on whether it's being done at the
9 sovereign's behest. It's a traditional rule of international
10 law. So it's not a matter of whether or not this was
11 undertaken for personal motive; although, there is, obviously,
12 evidence in the record that he exceeded his authority, which
13 gives rise to an inference, clearly, that he was acting in
14 pursuit of a personal objective.

15 THE COURT: Well, that, I guess you're right. I'll
16 take that back. I think you're correct. But I still have not
17 fully comprehended the scope of the activity that you say that
18 he is being sued for. Now, I assume you're not saying -- I
19 think part of the problem is that you're talking about not --
20 it doesn't sound to me that the two of you are talking about
21 the same case.

22 MR. CARTER: I think that's a fair assessment, your
23 Honor.

24 THE COURT: They're talking about you specifically
25 suing him only in an official capacity for the hiring decision

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1 that he made. I assume that that's not your theory.

2 MR. CARTER: That's not the theory and it's also not
3 what the Second Circuit understood the theory to be in
4 connection with the personal jurisdiction assessment.

5 The dispute we're having right now about the nature of
6 the claims was a central feature of the personal jurisdiction
7 appeal as well. In that setting, Defendant Al-Swailem argued:
8 I'm merely being sued for a decision to hire this one person to
9 work within the Saudi Joint Relief Committee.

10 And that clearly does not meet the Second Circuit's
11 due process test for requiring that I have direct and tortious
12 conduct with the United States. And that certainly would
13 almost clearly be the case under the Second Circuit's decision,
14 and so the remand itself is a reflection that the Second
15 Circuit rejected that view.

16 The full spectrum of the allegations in forming the
17 claims against Dr. Al-Swailem reveal that the Saudi Joint
18 Relief Committee and Saudi Red Crescent were longstanding
19 intimate collaborators with Al-Qaeda on a variety of fronts.

20 THE COURT: Well, what are you suing him for?

21 MR. KABAT: We sued him for, and that the Second
22 Circuit indicated we had sued him for, his role as the director
23 of that in orchestrating the overarching programs to support --

24 THE COURT: Well, again, when you say "role," I can't
25 accept that he's being sued because of his position. You have

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1 to do a better job articulating to me what conduct he's being
2 sued for. What do you claim that he did, that you say that you
3 get the umbrella of illegal activity that cannot be acts of the
4 sovereign? What is the illegal activity that you are suing him
5 for?

6 MR. CARTER: I understand, your Honor. The illegal
7 activity is the allegation that he used his position to direct
8 resources of the Saudi Joint Relief Committee and Saudi Red
9 Crescent Society directly to Al-Qaeda and that he put Al-Qaeda
10 members in positions of authority within the organization so
11 that they could use those entities and their assets as
12 platforms for advancing Al-Qaeda's goals.

13 And these allegations include statements by former
14 U.S. officials that more than \$74 million had been diverted
15 from the Saudi Joint Relief Committee during Dr. Al-Swailem's
16 stewardship to Al-Qaeda and its affiliates.

17 THE COURT: I want to put this part to rest. I assume
18 you would agree and concede that you would not be able to sue
19 him in his official capacity for the act of hiring?

20 MR. CARTER: If it were a simple personnel decision
21 made in good faith, no, your Honor, but the act of --

22 THE COURT: Well, even if he knew who he was hiring,
23 that, in and of itself, that act of hiring that person isn't
24 your claim.

25 MR. CARTER: It's not our sole claim, your Honor, but

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1 I do think --

2 THE COURT: Well, is it a claim?

3 MR. CARTER: It is a claim, and it would be illegal
4 under various UN security resolutions that prohibited parties
5 from allowing terrorist organizations to have access to
6 humanitarian organizations, in particular. There were, in
7 addition, UN security resolutions prohibiting any act that
8 would serve to deliver sources to the terrorist --

9 THE COURT: I know, but that doesn't necessarily
10 follow. I mean, if I hire you as my law clerk and it turns out
11 that you're a notorious bank robber, you can't sue me for that.
12 I mean -- well, I shouldn't say you can't sue me for that, but
13 that is not determinative that no sovereign immunity would
14 apply. I mean, you're clearly not suing him simply for hiring
15 an individual that you don't like.

16 MR. CARTER: No, your Honor.

17 THE COURT: So you're suing him for giving access to
18 financial resources to Al-Qaeda. That's the only thing I
19 could -- if I'm incorrectly articulating it, tell me.

20 MR. CARTER: No.

21 THE COURT: But that's, as I say, I'm focused on the
22 conduct. What are you suing him for? You're clearly not suing
23 him because he hired somebody who you say is an international
24 terrorist criminal. That's not the basis of whether or not he
25 is entitled to immunity or not entitled to immunity. If he

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1 took an official act, they say you hire somebody who's really
2 smart and can really do the job, and he said I know a guy. I
3 know he's a terrorist, you know, a murdering terrorist, or
4 whatever you want to -- any way you want to characterize it. I
5 would characterize it as terrible as you want to characterize
6 it.

7 If he says I know all these terrible things about him,
8 he's a bank robber, he's a murderer, all these other things,
9 but I think he's a real good computer programmer. I'm going to
10 hire him because the sovereign says you need somebody to run
11 the computer. You wouldn't say that that's a claim, would you?

12 MR. CARTER: Your Honor, again --

13 THE COURT: By itself.

14 MR. CARTER: I would say it's a claim. It's not our
15 sole claim, as you indicated.

16 THE COURT: How is that a claim? How is that, in and
17 of -- and if the person goes, does the computer stuff and
18 doesn't do anything else in the charity that affects Al-Qaeda
19 or your client, how is that independently a claim against him
20 for hiring that person?

21 There's no international law that says you can't hire
22 a person because they are a part of -- they are a member of
23 Al-Qaeda or that they have sympathies with Al-Qaeda. That's
24 not the rule. The rule is that you can't give them access to
25 financial resources and other resources, and you can't provide

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1 material support.

2 So that's where I'm focused. I'm not focused on
3 whether or not he comes in and, you know, he, as they say,
4 comes in and fixes the computers every day. And you say, well,
5 I'm suing you because you hired a person in Al-Qaeda to come
6 fix your computers. That's not your claim, I assume.

7 MR. CARTER: Your Honor, as I've said, the claim is
8 that he used the position to direct financial resources to
9 provide access to facilities where Al-Qaeda members were
10 planning attacks. The reason that --

11 THE COURT: I understand that. I understand that.
12 And I don't need to sort of go through, well, in what way do
13 you say he did that? Because I think that that argument is to
14 be made. That's for another day. I mean, you know, what is
15 the actual conduct that you say constitutes that and, you know.

16 But it's clear to me that that's where I start. I
17 don't start with he hired some guy who has an affiliation or
18 sympathy or is a member of Al-Qaeda. That's not actionable, in
19 and of itself. If he hired the guy and he never let him come
20 into the room where he could get access to any of the financial
21 resources to support Al-Qaeda, you wouldn't have a claim.

22 MR. CARTER: Your Honor, the only reason I'm -- again,
23 it doesn't affect this analysis, but under the Anti-Terrorism
24 Act, for instance, it would be a violation of U.S. law for
25 someone to hire a known Al-Qaeda member and give them a salary.

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1 That would be material support, regardless of what they were
2 doing while on the job. That would be material support. It
3 would be a violation of the Anti-Terrorism Act to hire an
4 Al-Qaeda member and give them the cover of employment with your
5 organization so that they could travel and carry out Al-Qaeda
6 business.

7 THE COURT: Well, that's different. You just loaded
8 the example. Of course, that's in violation. You know, you
9 can't do that. But that's not simply the act of hiring
10 somebody. If I say, well, you need a job, and we need somebody
11 to sweep the floors every night before we go home, I'll hire
12 you. And then you say, well, thanks, but let me just -- I want
13 to let you know that I'm a member of Al-Qaeda, you know, I'm
14 not sure that you have a cause of action against the guy who
15 hired him to sweep the floor, if that's the only relationship
16 he has with this person.

17 MR. CARTER: Your Honor, I think that in that
18 setting --

19 THE COURT: You may be right, but I wouldn't --

20 MR. CARTER: The issue is that the definition of
21 material support in the Anti-Terrorism Act is very broad.

22 THE COURT: Right. But you're suing him for providing
23 material support.

24 MR. CARTER: That's correct, your Honor.

25 THE COURT: So you're not suing him for just a hiring

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1 decision. If that hiring decision did not provide Al-Qaeda
2 material support, then it is not actionable.

3 MR. CARTER: That's correct.

4 THE COURT: It's not even -- not only would he be
5 covered, that act itself would be covered by sovereign
6 immunity. It probably wouldn't be even actionable under the
7 Act. The act requires -- you must be standing here telling me
8 that you're suing him in his individual, personal capacity
9 because he personally provided material support to Al-Qaeda,
10 right? That's got to be your claim, right?

11 MR. CARTER: Your Honor, it is the claim.

12 THE COURT: Okay.

13 MR. CARTER: Because the illegality of the conduct
14 causes it to be personal within the model of international law
15 that refuses to acknowledge illegal acts as official acts, and
16 therefore, yes, the result is that it's private conduct.

17 Again, as I said, when you look at *Victory Transport* --

18 THE COURT: When you say it is private conduct, it's
19 the "it" that is a little --

20 MR. CARTER: The provision of material --

21 THE COURT: -- that you guys don't agree with and
22 don't give me the same definition.

23 MR. CARTER: It's the provision of material support,
24 your Honor. Again, the Second Circuit was clear --

25 THE COURT: What are the details of how you say he

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1 provided material support?

2 MR. CARTER: Your Honor, the way that the Second
3 Circuit properly understood the allegations, was that the
4 allegations themselves provided a wealth of detail,
5 conscientiously cited to, published and unpublished, reports
6 citing close-working relationships between these charities and
7 Al-Qaeda, and that the systematic and programmatic nature of
8 the support programs --

9 THE COURT: That wasn't my question. I mean, I really
10 wanted a simple answer, not a complicated answer. What do you
11 say he did to provide material support to Al-Qaeda? Because I
12 just want that. I want to be able to start with that. Give me
13 a good, clean definition of that. That's the one I'm going to
14 use.

15 MR. CARTER: He was in control of the organization
16 during the periods in which the organizations channeled
17 millions and millions of dollars to Al-Qaeda, allowed Al-Qaeda
18 members to use their facilities to plan attacks, moved men and
19 resources on behalf of Al-Qaeda into conflict regions. It's a
20 broad range of conduct, and it's reflected in the extrinsic
21 evidentiary submissions as well. And, again, your Honor --

22 THE COURT: Well, although it's still a little
23 awkward, and maybe you purposely are characterizing it that way
24 or articulating it that way, but to simply say -- I was hoping
25 that I would hear you say you're accusing him of providing

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1 material support to Al-Qaeda, but you said you were accusing
2 him of being in control of the organization when the
3 organization provided material support to Al-Qaeda.

4 MR. CARTER: I'm sorry.

5 THE COURT: You got more lawyerly complicated than we
6 needed to be, if you're trying to tell me that that's supposed
7 to be a statement that you're accusing him of providing
8 material support.

9 MR. CARTER: No, your Honor. I'm sorry. I was trying
10 to explain the record.

11 THE COURT: I'm not asking you to explain the record.
12 I know the record. I'm trying to figure out, on this issue,
13 the relevant analysis on this issue, what is the conduct that
14 you say is the conduct by this individual that is not protected
15 by sovereign immunity because it is not conduct in his official
16 capacity by the State.

17 MR. CARTER: It's the provision of material support to
18 Al-Qaeda, your Honor, and the Second Circuit --

19 THE COURT: By doing what?

20 MR. CARTER: The Second Circuit --

21 THE COURT: No. By doing what? In what way did he --

22 MR. CARTER: By delivering financial resources under
23 his control to Al-Qaeda.

24 THE COURT: Okay.

25 MR. CARTER: And by delivering physical resources

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1 under his control directly to Al-Qaeda.

2 THE COURT: Knowingly and intentionally?

3 MR. CARTER: Knowingly and intentionally.

4 THE COURT: That's what I want to understand. This is
5 not a trick question. I'm just trying to clearly, cleanly
6 articulate what it is that you say that this case is about with
7 regard to him personally. And, you know, in order to get in
8 your direction, I first have to get past their argument that
9 you're not suing him in his personal capacity. You simply
10 always allege and were always suing him in his official
11 capacity, and in suing him in his official capacity because he
12 hired this one individual.

13 I assume, and I'll go back to the record and my
14 recollection is that you at least -- I don't remember the
15 details of the what the complaint says about that, but at least
16 in the numerous papers on these issues and other context, you
17 articulated it in a different way.

18 Now, I don't want to say you're changing your story
19 from what was in the complaint. I'll look at the complaint and
20 see whether that's what the complaint says, but that's what
21 I -- I mean, if you tell me that there's a sufficient record
22 here to indicate that you are suing him in his personal
23 capacity, individually, for conduct which is not conduct,
24 official conduct on behalf of the sovereign, where the
25 sovereign would have sovereign immunity, then I can understand

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1 your argument. But if it's not that, then you have to focus me
2 on what else you say that this claim is about.

3 MR. CARTER: Your Honor, you're understanding what the
4 claim is about. The point I think that requires emphasis is
5 that the distinction between private and official conduct
6 within the law of common-law immunity has a specific
7 connotation. And personal conduct is used to describe conduct
8 which is illegal or in violation of international law and,
9 therefore, was viewed historically as not to be properly
10 characterized as official.

11 And so our arguments regarding the immunity question
12 focus on the precise legal standard that governs, and we
13 clearly indicated that the conduct in providing material
14 support directly to Al-Qaeda is illegal and, therefore, can't
15 entitle him to common-law immunity.

16 There is an additional reason which is that the
17 common-law immunity, even for official acts, was traditionally
18 said to run only to the activities of traditional governmental
19 ministers in the performance of core governmental governments,
20 and would not extend to activities in which private parties
21 typically engage. Now, by their own description of
22 Dr. Al-Swailem's role, he was there to manage a purported
23 humanitarian relief organization that was organizing the
24 activities of other private relief organizations in Kosovo and
25 Chechnya.

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1 So the nature of his official position is also
2 condemning to his application for sovereign immunity. Now,
3 that's under the *Victory Transport* standard. The *Victory*
4 *Transport* court made clear that there could be an expansion of
5 common-law immunity to other categories of official conduct if
6 supported by a statement of interest by the State Department,
7 and the State Department has done that in certain cases. But
8 there is none here and, therefore, the rubric announced in
9 *Victory Transport* is controlling.

10 THE COURT: Well, the one thing you don't reconcile
11 is, you don't reconcile the activity qualifying -- being
12 sovereign immunity for the sovereign, but not being sovereign
13 immunity for the official.

14 MR. CARTER: Your Honor, I --

15 THE COURT: And I'm not sure where you draw the
16 distinction. I mean, the analysis that you gave me is not an
17 analysis that simply applies to individuals. It's an analysis
18 that applies to the sovereign. So your analysis is
19 inconsistent with a determination that the activity that the
20 sovereign was involved in, through these agencies, is entitled
21 to sovereign immunity. That issue has already been determined.

22 MR. CARTER: Your Honor, what the Supreme Court has
23 said about that, what the State Department has said about that
24 is that immunity under the common law for officials and
25 immunity under the statutory framework under the Foreign

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1 Sovereign Immunity Act are not co-extensive.

2 Now, Mr. Kabat suggested that common-law immunity is
3 broader. That's not what the cases say. The cases say it's
4 not co-extensive. So there may very well be circumstances in
5 which the statutory requirements of the FSIA confer immunity on
6 an agency, but the traditional standards of common-law immunity
7 do not confer immunity on one of its officials for the actions
8 he undertook.

9 THE COURT: I know, but I just don't understand -- I
10 understand that argument in the abstract, but I don't
11 understand what definition of sovereign immunity that's being
12 applied in the statute that is different than the definition
13 that would be applied outside of the statute as it applies to
14 the sovereign.

15 MR. CARTER: The statute would govern as to the
16 sovereign solely, your Honor. The common-law immunity
17 framework would not govern at all.

18 THE COURT: Well, yes, but I mean, are you saying that
19 there is a nongovernmental function exception in the common
20 law, but not such an exception to be applied under the statute?

21 MR. CARTER: That's correct, your Honor. In the
22 common law framework announced in *Victory Transport* there are
23 limitations of common-law sovereign immunity to certain
24 specified activities. In the FSIA, that is not the regime that
25 governs with regard to agencies.

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1 Now, agencies, if they qualify under the definition of
2 foreign state, are entitled to invoke the immunity. They are
3 presumed immune unless one of the statutory exceptions to
4 immunity applies, and so you go through the test of the
5 statutory exceptions. The test is simply different in the
6 common-law immunity domain and the disparity produces a
7 different result for Dr. Al-Swailem.

8 THE COURT: I understand.

9 MR. CARTER: Your Honor, I'm just looking through my
10 notes of Mr. Kabat's discussions with you.

11 THE COURT: Sure.

12 MR. CARTER: Your Honor, if I can, I'll just take a
13 moment. Some issues came up about the Mumbai case and the
14 statement of interest in that case. Just for very briefly, the
15 one point I would make about that is that the Mumbai case is
16 different in two respects. The first is that a statement of
17 interest was provided supporting immunity, which removed that
18 case from the limitations imposed by the Second Circuit under
19 *Victory Transport*. And defendants in that case were officials
20 of a foreign government intelligence service. One of the
21 categories of conduct that even *Victory Transport*, at least in
22 theory, would recognize. Although, I'm sure there are
23 arguments of the illegality of their conduct, as well. But I
24 think Mr. Kreindler has a few comments about that, since he was
25 involved.

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1 THE COURT: All right.

2 MR. KREINDLER: Thank you, Judge. All roads lead to
3 Rome, and terrorism cases, from the Libya case to 9/11 to the
4 Mumbai attack, all were related; so I just want to take a
5 couple of minutes and address some of the things involving our
6 Mumbai terror attack.

7 First of all, we're going to have oral argument in the
8 Second Circuit on this issue sometime the week of May 19th. We
9 don't have the date yet, and we want you to know that that's
10 coming, and presumably there will be a decision from the Second
11 Circuit soon after that.

12 Let me say something about the government's statement
13 of interest, because the situation in Mumbai is highly unique.
14 The government took a long time before it filed a statement of
15 interest there. No question the government was bothered by the
16 fact that a week after we sued the ISI, Pakistan's intelligence
17 agency, for directing the terrorists to kill Americans,
18 Israelis and other people at the hotels in India, a suit was
19 started in Pakistan against the CIA, naming the CIA officials
20 and saying the CIA is using drones to, you know, murder
21 innocent civilians.

22 And there's no question at all that when the State
23 Department filed its statement of interest there, they were
24 very concerned about the precedence saying an intelligence
25 agency can be sued and the heads of an agency could be sued

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1 because they were afraid of having that thrown in their face by
2 the suit in Pakistan.

3 THE COURT: I mean, that makes an interesting surmise,
4 but I don't think there's anything in the record that indicates
5 it.

6 MR. KREINDLER: You know, I'm up for a minute to talk
7 about some other aspects. Some things are in the record.
8 Still in the case, with no suggestion of immunity, are
9 government officials in the Mumbai case. At the criminal trial
10 in Chicago, where the government brought forward the testimony
11 of David Headly, he identified individuals in the ISI,
12 government officials, who he met with to plan the attack on
13 Mumbai. And afterwards, officials said, I was directing the
14 terrorists who to kill.

15 The problem we have, we sued the two directors of the
16 ISI, Pasha, Asad, and the government in its little paragraph
17 addressing the individuals said there's nothing specific, and
18 that's true. We said that they're the head of the
19 organization. We did have the detail, we did, about the other
20 government officials, their direct role. For one of them, we
21 knew that he visited the terrorists in jail. But that which is
22 in the statement of interest is something for you to know about
23 and put in context.

24 Now, just a personal observation. The way I look at
25 this defendant and some of these other cases, and maybe my

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1 personal observation will be of no value, but we've all seen
2 those movies where the bad guys can't get into a castle and
3 there's a spy in the castle who opens a little door, letting
4 one of the bad guys in and the bad guy torches the facility and
5 opens all the other doors and bad guys come in and overrun the
6 castle.

7 When you hire a terrorist and give them access and put
8 them inside the castle, access to money, access to
9 communication, that's the image I have in my mind that applies
10 to this defendant and is, frankly, the image I have with a lot
11 of the defendants in the case who have, in essence, taken an
12 Al-Qaeda bad guy, lowered the door and put him in an
13 environment where he can do damage. That's how I've always
14 seen this defendant and others, and I thought I'd mention it
15 for what it's worth.

16 THE COURT: Thank you. Yes, sir?

17 MR. KABAT: Your Honor, I'll be very brief. I'd just
18 like to address four points that Mr. Carter made. First of
19 all, Judge Casey and Judge Robertson before him were able to
20 decide the sovereign immunity defenses of at least four of
21 them, the cabinet ministers the agency had, Prince Sultam and
22 Prince Turki, without a State Department submission. Your
23 Honor can do the same here by looking to what the government
24 has submitted in other cases, and more importantly, the careful
25 consideration of the common-law sovereign immunity.

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1 And the Second Circuit had made clear, particularly in
2 the Heeding case, *Heeding v. Mexico*, also the *Hoffman* case and
3 for Linden, that the State Department submission is not
4 required. The District Court can go ahead and decide sovereign
5 immunity without that submission.

6 Secondly, I'm hearing two quite different conflicting
7 theories of the case. One is that Dr. Al-Swailem, according to
8 Mr. Carter, diverted resources to Al-Qaeda, but you have to
9 remember that the plaintiffs sued the Saudi Red Crescent and
10 the Saudi Joint Relief Committee for officially supporting
11 Al-Qaeda. So it's not clear to me how the plaintiff, having
12 lost on the theory that the agencies directly supported
13 Al-Qaeda, can turn around and say, oh, no, it wasn't that at
14 all, the agencies are diverting resources. He's entirely
15 inconsistent claiming.

16 Mr. Carter also referred to the control of the
17 organization. Well, again not inconsistent with the fact that
18 both this court and the Second Circuit held that those agencies
19 were immune under the FSIA. They made the same allegations of
20 material support with respect to the Saudi Red Crescent and the
21 Saudi Joint Relief Committee. They lost under the FSIA. They
22 did not seek Supreme Court relief. Now they're here in court
23 today telling us that Dr. Al-Swailem diverted resources, which
24 is inconsistent with their having sued him in his official
25 capacity.

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1 THE COURT: Well, you know --

2 MR. KABAT: There are other concerns.

3 THE COURT: Just as I've asked them whether they would
4 have to concede that they were just suing him in his official
5 capacity for officials acts in the sovereign for hiring, that
6 that would not be a claim. I assumed that you would have to
7 concede that if they are suing him for knowingly and
8 intentionally providing access to financial resources to
9 Al-Qaeda, you would have to concede that that would not -- he
10 would not be provided sovereign immunity for that purpose and
11 for that activity.

12 MR. KABAT: Well, your Honor, the claim just made, to
13 say that each of those agencies, the Saudi Red Crescent and the
14 Saudi Joint Relief Committee, each gave resources to Al-Qaeda,
15 that is not enough to waive their sovereign immunity under
16 FSIA; so it is here with Dr. Al-Swailem.

17 The plaintiff did not plead any specific facts showing
18 that he diverted resources, let alone directly provided
19 material support, to Al-Qaeda. We look at the claims in their
20 complaint and with those statements, and they're based on
21 allegations in their opposition motion to dismiss, but that is
22 not a ground to amend their complaint.

23 For perfect sovereign immunity, you really have to
24 look at what they pled, not in the contradictory allegations in
25 their motion to dismiss. And Mr. Carter also tried to claim,

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1 again, something that these agencies were like private parties
2 providing humanitarian militia. While the law remains, the
3 Second Circuit made clear that Red Crescent and the Joint
4 Relief Committee are not private parties. They're agencies in
5 the Saudi government --

6 THE COURT: Well, they didn't review that in the
7 context of common-law sovereign immunity.

8 MR. KABAT: Pardon?

9 THE COURT: They didn't view that in the context of
10 common-law sovereign immunity.

11 MR. KABAT: Right, but --

12 THE COURT: You candidly said, that's a different
13 standard. They were looking at the statutory standard of
14 sovereign immunity, not the common-law standard sovereign
15 immunity.

16 MR. KABAT: Your Honor, the plaintiff in the Second
17 Circuit brief specifically said that both of those were
18 agencies or instrumentalities of the Saudi government. They
19 did not plead to the Second Circuit that these were private
20 entities, as they are now claiming. And, in fact, the best
21 analogy is the U.S. Agency for International Development, which
22 is a part of the U.S. government, it does humanitarian work
23 overseas like in hurricanes, earthquakes, what have you, and
24 the courts in the District of Columbia, where the U.S. Agency
25 is located, have held that the U.S.A.I.D. is covered by

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1 sovereign immunity because of its humanitarian work.

2 THE COURT: But none of that was in the discussion of
3 common-law sovereign immunity.

4 MR. KABAT: True, which is even broader in the FSIA.

5 THE COURT: At this point, I'd have to say different.
6 You know, it is different. It is a different analysis. As I
7 said, it can't be broader for your purposes, but then be more
8 restrictive, you know, for your other purposes. I mean, either
9 it is a different analysis. I can't use the analysis under the
10 statute of whether or not the entities qualified for sovereign
11 immunity to say that any court in their mind was thinking about
12 whether or not it was commercial, non-governmental or any other
13 issue beyond whether or not they met the language of the
14 statute.

15 I don't think that there's a case that says that that
16 was a relevant consideration of the court, and I'd like you to
17 point my attention to it. But no court had that in mind. I
18 can't look to any decision in this area that gives me guidance
19 on that, I don't think. On that specifically.

20 MR. KABAT: Well, no. Mr. Carter said that the two
21 immunities were co-extensive. What he did not say is the
22 Supreme Court in the *Samantar* case explained, that even in
23 those circumstances where a foreign agency or foreign state
24 might be liable, the individual foreign official involved with
25 the same decision, the plotting against the State, would not be

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1 personally liable. And that goes back to the 1976 decision
2 from the Southern District called *Greenspan v. Crosbie*. That
3 case was cited by the Supreme Court, and it was also cited by
4 the State Department in its amicus brief in the *Federal*
5 *Insurance v. Saudi Arabia* cert petition back in 2009 for the
6 proposition that, quote, the executive branch continues to
7 recognize the immunity of foreign officials for their official
8 acts in circumstances in which the state itself would not
9 itself be immune.

10 Now, here, of course, the state is immune. We know
11 that because the Saudi Red Crescent and the Saudi Joint Relief
12 Committee were held by this court, in the Second Circuit to be
13 covered by FSIA. Plaintiffs have not sought further review of
14 this, so here we're even further within that safe harbor.
15 Thank you.

16 MR. CARTER: Your Honor, may I just raise two very
17 brief points? And I apologize for not having this at my
18 fingertips when we were discussing the nature of the
19 allegations, but again, I think that the way that the Second
20 Circuit characterized them is, in fact, the law of the case.
21 It makes clear what the claims at issue are, and in this
22 section of the decision, it was referred to Dr. Al-Swailem as
23 among a group that it referred to as the "charity official
24 defendants."

25 And what the Second Circuit said specifically was:

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1 The charity official defendants allegedly controlled and
2 managed some of those charitable organizations, and through
3 their positions of control, they allegedly sent financial and
4 other material support directly to Al-Qaeda when Al-Qaeda
5 allegedly was known to be targeting the United States.
6 Construing all reasonable inferences in favor of the
7 plaintiffs, these allegations suggested the charity official
8 defendants provided financial and other resources to Al-Qaeda
9 knowing that Al-Qaeda was engaged in a global campaign of
10 terror directed at the United States.

11 And that is the basis of the claim as described by the
12 Second Circuit, and the one that dictates that sovereign
13 immunity not attend to the claims here. Thank you, your Honor.

14 THE COURT: Thank you. All right. I'm going to let
15 you get to -- I don't know how -- Is Judge Maas' clerk here?

16 THE DEPUTY CLERK: We're going to resume at 2:00.

17 THE COURT: Okay. I'm going to let her give you
18 directions. I'm going to move forward with this, and I'll talk
19 to Judge Maas and see whether or not we can get this done
20 before we see each other next time, and then I'll see if there
21 are other issues that we need to address surrounding it. Thank
22 you.

23 MR. CARTER: Thank you, your Honor.

24 MR. KABAT: Thank you.

25 (Adjourned)